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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

ANTHONY DI LAPI, ROBERT RAO, SIDNEY LIEBERMAN, BENJAMIN LADMER, STEPHEN KINGSTON, DAVID BERGNER and INTERSTATE DRESS CARRIERS, INC.,

Petitioners,

—against—

JOHN S. IRVING, General Counsel, National Labor Relations Board,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MARTIN LONDON
RONALD W. MEISTER
345 Park Avenue
New York, New York 10022
(212) 644-8000
Attorneys for Petitioners

Of Counsel
DAVID DUNN
PAUL, WEISS, RIFKIND, WHARTON & GARRISON

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Preliminary Statement

This case raises urgent questions about the separation of powers; about a defendant's Sixth Amendment rights to confrontation and to the effective assistance of counsel; and about the existence of a new governmental privilege. The decision of the court below sanctions actions by the judicial branch of government to review and overrule executive branch decisions to forego prosecution in favor of maintaining confidentiality of documents. Moreover, the court below

created a new privilege, and called into question the continuing validity of this Court's landmark decision in *Jencks* v. *United States*. Finally, the decision conflicts directly with a decision of another court of appeals.

This case centers on the government's refusal to provide defendants with evidence material to their defense in a criminal case. The United States District Court for the Eastern District of New York directed the National Labor Relations Board ("NLRB") to produce that evidence in response to two subpoenas. The NLRB, claiming the documents sought were privileged, refused a direct court order to produce, whereupon defendants moved to dismiss the indictment. In an effort to sustain the indictment and compel the government to proceed with the prosecution, the District Court *sua sponte* held the NLRB's General Counsel in criminal and civil contempt of court.

The United States Court of Appeals for the Second Circuit agreed that the subpoenaed evidence was material to the defense, and held the District Court did not abuse its discretion in requiring production. Nevertheless, the Court of Appeals, ignoring this Court's decision in *Jencks* v. *United States*, 353 U.S. 657 (1957), and its own unbroken line of authority since *United States* v. *Andolschek*, 142 F.2d 503 (2d Cir. 1944) (L. Hand, J.), declined even to address the question of dismissal. Instead, it created a new governmental privilege for the documents—documents the District Court had found to lie "at the heart of the instant indictment"—and forbad their disclosure to the defendants themselves. That restriction deprives defendants of their Sixth Amendment rights to confrontation and effective assistance of counsel, and conflicts squarely with the recent decision of the United States Court of Appeals for the Eighth Circuit in *United States* v. *Benfield*, 593 F.2d 815 (8th Cir. 1979).

Defendants petition this Court to apply its ruling in *Jencks* that "a criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce." 353 U.S. at 672. We also ask this Court to declare that the Court of Appeals' refusal to permit defendants to confront the evidence and witnesses against them violates the Sixth Amendment.

Opinions Below

The opinion of the Court of Appeals* is not yet officially reported. It has been reported at 85 Lab. Cas. [CCH] ¶ 11,221 and 101 L.R.R.M. [BNA] 2093 (1979), and is annexed as Appendix A to this petition. The opinion of the United States District Court for the Eastern District of New York** is not officially reported, but is reported at 100 L.R.R.M. [BNA] 2601 (1979). It is annexed as Appendix B to this petition.

Jurisdiction

The Court of Appeals entered judgment on April 12, 1979. On June 12, on defendants' application, it stayed its mandate to permit filing of this petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. May the judicial branch of government employ its contempt power, *sua sponte*, to overturn an executive branch decision that the government's interest in confidentiality of evidence outweighs its interest in prosecuting a criminal case?

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* Per Henry F. Werker, U.S.D.J., sitting by designation.

** Per Henry Bramwell, U.S.D.J.

2. Should this Court's decision in *Jencks* v. *United States*, 353 U.S. 657, 672 (1957), that "a criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce", be overruled?

3. Where a trial court in a criminal case finds that documents in the government's possession relate directly to issues at the heart of the indictment, and are material to adequate preparation of the defense, and therefore orders those documents disclosed to defendants; and an appellate court finds the trial court did not abuse its discretion, may the appellate court, consistent with defendants' Sixth Amendment rights to confrontation and the effective assistance of counsel, prohibit defense counsel from showing the documents to, or discussing them with, defendants?

Constitutional Provisions Involved

This case involves the Fifth and Sixth Amendments to the Constitution of the United States. The text of those amendments is annexed as Appendix C to this petition.

Statement of the Case

Defendants were indicted on September 6, 1978, in the United States District Court for the Eastern District of New York, on charges of conspiring and endeavoring to obstruct a proceeding before the NLRB.

From October to December, 1978, petitioner Interstate Dress Carriers, Inc. ("IDC") filed three separate discovery motions and (at the District Court's direction) made several informal requests of the government for specific materials relating to the NLRB proceeding. The government met each request with evasion or silence.

On December 22, after IDC's third discovery motion, the District Court directed the prosecutor to inquire specifically of the NLRB and one of his own witnesses whether they had the documents demanded and, if they did, to make them available to IDC.

On December 27, the prosecutor wrote to the Court and admitted that "*both* Mr. Eason [his witness] and the NLRB have the records." However, the government refused to obey the Court's order that the records be produced. Instead, for the first time, three months after IDC's first discovery motion, the government claimed the records were privileged.

IDC then obtained and served on two NLRB officials trial subpoenas *duces tecum* seeking the same and related materials. Those subpoenas were returnable on the first day of trial, January 3, 1979. On that day, the government moved to quash the two subpoenas served on the NLRB officials.

On January 8, the District Court found that the materials sought by IDC "relate directly" to the NLRB proceeding "which lies at the heart of the instant indictment", and that they "are material to adequate preparation of IDC's defense." The court ordered those documents produced to defendants immediately and without restriction.

The government attempted to appeal the disclosure order that same day. The following morning the United States Court of Appeals for the Second Circuit dismissed the appeal and denied mandamus in an opinion holding: "Judge Bramwell did not abuse his discretion in finding that the materials sought here may be important in the preparation of the defense."*

* The Court of Appeals' order, though not its opinion, is reported at 595 F.2d 1209 (2d Cir. 1979).

The district court attempted to resume the trial that same afternoon. Nevertheless, the government announced its refusal to comply with the production order. Defendants thereupon moved to dismiss the indictment.

On January 11, John S. Irving, General Counsel to the NLRB, appeared in the District Court and took possession of some of the subpoenaed material. The District Court issued a direct order that he produce the documents. He refused. The court, on its own motion, thereupon held him in contempt. As a result, the trial has been suspended since January 12.*

The NLRB again appealed. On April 12, the Court of Appeals issued its decision, affirming in part and modifying in part the decision of the District Court.

The Court of Appeals upheld the District Court's order requiring production of the subpoenaed documents, holding:

> "[T]he District Court did not abuse its discretion in finding 'that the documents subpoenaed bear on the transaction underlying the instant indictment and are material to preparation of IDC's defense. . . .'" (Slip op. at 2174-75).

Nevertheless, the court placed extraordinary limits on the disclosure of the subpoenaed documents. It prohibited defense counsel from showing the subpoenaed materials to their clients or revealing their contents to them.** The Court of Appeals failed to address defendants' contention

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* The following day, the prosecutor revealed that a portion of the subpoenaed materials had, in fact, been in his possession since before the indictment. Even then, he did not make that material available, and he has not done so to this day.

** In view of its modifications of the disclosure order, the Court of Appeals affirmed the civil contempt sanctions against the NLRB's general counsel, but vacated the criminal contempt sanction.

that the appropriate remedy for the government's failure to produce material evidence was dismissal of the indictment, not sanctions compelling disclosure.

Reasons for Granting the Writ

I

The Indictment Must Be Dismissed for the Government's Suppression of Material Evidence.

The determination of whether to continue a prosecution, or preserve the secrecy of material sought by the defense, is for the government to make, and not for the courts to review. This Court clearly enunciated that rule in *Jencks* v. *United States*, 353 U.S. 657, 672 (1957), saying:

> "We hold that a criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial. *Accord, Roviaro* v. *United States*, 353 U.S. 53, 60-61. The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession."

The courts have repeatedly held that criminal trials may not proceed when the government refuses to produce evidence in its possession that is material to the defense. *See United States* v. *Coplon*, 185 F.2d 629, 638 (2d Cir. 1950) (L. Hand, J.); *United States* v. *Grayson*, 166 F.2d 863, 870

(2d Cir. 1948) (L. Hand, J.); *United States* v. *Beekman*, 155 F.2d 580 (2d Cir. 1946) (Frank, J.); *United States* v. *Andolschek*, 142 F.2d 503 (2d Cir. 1944). *See also, Roviaro* v. *United States*, 353 U.S. 53 (1957).

The District Court and Court of Appeals agreed that the documents defendants seek lie "at the heart of the instant indictment" and are material to adequate preparation of a defense. IDC persistently sought this material from its very first discovery motion until after the opening of trial three months later.

The constitutional requirement in these circumstances is unambiguous: when the government refuses to produce material evidence, the criminal charge must be dismissed.

This Court summarized the rule in its decision in *United States* v. *Reynolds*, 345 U.S. 1, 12 (1953):

> "The rationale of the criminal cases is that, since the Government which prosecutes an accused also has a duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."

The line of authority for this proposition dates from the decision of Judge Learned Hand in *United States* v. *Andolschek*, 142 F.2d 503 (2d Cir. 1944). That case, like this one, was "a criminal prosecution, founded upon those very dealings to which the documents [sought by defendants] relate." 142 F.2d at 506. Judge Hand wrote for the court the words that have since become the classic statement of the rule:

> "The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully." *Id.*

Once the trial court here found the documents improperly withheld by the government were material to IDC's defense, the appropriate remedy was dismissal of the indictment.*

II

Prohibiting Disclosure to Defendants Violates Their Sixth Amendment Rights to Confrontation and to the Effective Assistance of Counsel.

A. The Court of Appeals Improperly Substituted Its Discretion for That of the Trial Court

The Court of Appeals affirmed IDC's right to demand production of documents that "bear on the transaction underlying the instant indictment and are material to adequate preparation of IDC's defense." (Slip op. at 2174-75). It further recognized that "the trial court's decision is not to be disturbed on appeal unless it can be shown that it acted arbitrarily and abused its discretion or that its finding was without support in the record." (Slip op. at 2174). It then specifically held the District Court did not abuse its discretion in requiring full disclosure.

Nevertheless, the Court of Appeals substituted its discretion for that of the trial court, and severely restricted the order entered by the trial court after careful consideration of the alternatives. This substitution of judgment violates the Court of Appeals' own citation of *United States*

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* The Court of Appeals' failure to consider IDC's prolonged efforts to obtain the subpoenaed material caused it to gloss over the propriety of sanctions directed not only at the NLRB, but at the prosecution as well. The duty of disclosure under Rule 16 of the Federal Rules of Criminal Procedure "affects not only the prosecutor, but the Government as a whole, including its investigative agencies." United States v. Bryant, 439 F.2d 642, 650 (D.C. Cir. 1971). United States v. Caldwell, 543 F.2d 1333, 1352 n. 91 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 1087 (1976). *Accord*, Harvey Aluminum v. NLRB, 335 F.2d 749, 754 (9th Cir. 1964).

v. *Nixon,* 418 U.S. 683, 702 (1974), which emphasized the "great deference . . . to be accorded the District Court's decision as to the scope of a subpoena or disclosure order." (Slip op. at 2178 n. 9). Further, the Court of Appeals restricted disclosure despite holding that "the considerations supporting disclosure in the case at bar are even stronger than those in *Nixon* . . . ." (Slip op. at 2178). The record in this case amply demonstrates that the trial court, over a period of four days, carefully considered and then rejected alternatives to full disclosure—including the one ultimately chosen by the Court of Appeals.

Further, in substituting its discretion for that of the trial court, the Court of Appeals gave undue weight to the NLRB's "generalized interest in confidentiality", *United States* v. *Nixon,* 418 U.S. at 713. The court's construction of a new governmental "privilege" flies in the face of this Court's caution in *Nixon* that "the very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts." 418 U.S. at 709.

B. Right to Confrontation

The Sixth Amendment right to confront witnesses has long meant "seeing the witness face to face." *Mattox* v. *United States,* 156 U.S. 237, 244 (1895). *Kirby* v. *United States,* 174 U.S. 47 (1899).

The Second Circuit's decision rejecting defendants' right personally to examine this evidence, conflicts directly with a recent decision of the United States Court of Appeals for the Eighth Circuit that reemphasized a defendant's right to face-to-face confrontation. In *United States* v. *Benfield,* 593 F.2d 815 (8th Cir. 1979), the Eighth Circuit held:

> "[T]he confrontation clause contemplates the active participation of the accused at all stages of the trial, including the face-to-face meeting with the witness at trial or, at the minimum, in a deposition allowing the accused to face the witness, assist his counsel, and participate in the questioning through his counsel." 593 F.2d at 821.

In *Benfield,* the defendant in a kidnapping case was excluded from a deposition of the complaining witness, because the witness feared intimidation. Although the defendant was permitted to view the examination on a television monitor, and to halt questioning and summon his counsel at any time, the Court of Appeals found a violation of his right to confrontation. Confrontation, it held, means more than confrontation by counsel alone:

> "Most believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge. This feature is a part of the sixth amendment right additional to the right of cold, logical cross-examination by one's counsel." 593 F.2d at 821.

Here the violation of defendants' rights goes even further. The Court of Appeals recognized defendants' right to examine witnesses concerning the subpoenaed documents. But it not only forbad defendants to attend the interviews of those witnesses against them, it even prohibited defendants' knowing their identities. Moreover, the witnesses will know their statements will go unchallenged by the only one able to challenge them—their employer, IDC. Defendants will thus be deprived of the vital test of confrontation on "recollection, veracity and communication." The defendants themselves must be permitted access to this prosecution evidence, which the District Court found, and the Court of Appeals affirmed, lies at the heart of this indictment.

C. Effective Assistance of Counsel

In addition to denying the defendants their constitutional right to confront the evidence against them, the Court of

Appeals' restrictions on disclosure of material evidence seriously impairs defendants' ability to use that evidence effectively. It therefore deprives them of an opportunity to participate in their own defense and renders counsel incapable of providing effective assistance.

This Court has recognized that the right to the assistance of counsel was not intended to limit in any way a defendant's right to conduct or participate in his own defense. *Faretta* v. *California*, 422 U.S. 806, 816 (1975); *see also, United States* v. *Plattner*, 330 F.2d 271, 274 (2d Cir. 1964). And, since "the right to counsel is the right to the effective assistance of counsel", *McMann* v. *Richardson*, 397 U.S. 759, 771 n. 14 (1970), that right includes the right to consult with counsel at all important stages of the defense. *See, e.g., Geders* v. *United States*, 425 U.S. 80 (1976); *United States* v. *Wade*, 388 U.S. 218 (1967); *Escobedo* v. *Illinois*, 378 U.S. 478 (1964).

The Court of Appeals recognized defendants' legitimate interest in examining the genuineness and validity of the documents subpoenaed by IDC. (Slip op. at 2174). Simultaneously, however, the court prohibited the defendants from participating in the use of that evidence.

Defendants are entitled to *effective* examination of the evidence against them. They must be permitted to call upon what they know about that evidence—not just what their counsel know. The vindication of defendants' right to the effective assistance of counsel requires that they be permitted to utilize all information available in preparing their defenses.

Conclusion

The petition for a writ of certiorari should be granted to determine the permissible extent of judicial interference in executive decisions affecting prosecution; the continued vitality of *Jencks;* the existence of a new governmental privilege; and the extent to which defendants in criminal cases may be denied the right to confront the witnesses and evidence against them.

Respectfully submitted,

MARTIN LONDON
RONALD W. MEISTER
345 Park Avenue
New York, New York 10022
(212) 644-8000

Attorneys for Interstate Dress Carriers, Inc. and, for purposes of this petition, all other petitioners

Of Counsel

DAVID DUNN
PAUL, WEISS, RIFKIND, WHARTON & GARRISON

July 11, 1979

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 740-741, August Term, 1978.

(Argued February 7, 1979 Decided April 12, 1979.)

Docket Nos. 79-1017, 1018

In re JOHN S. IRVING, General Counsel, National Labor Relations Board, a Witness Under Subpoena to Produce Documents,

Appellant,

UNITED STATES OF AMERICA,

Plaintiff,

—against—

ANTHONY DILAPI, ROBERT RAO, SIDNEY LIEBERMAN, BENJAMIN LADMER, STEPHEN KINGSTON, DAVID BERGNER, and INTERSTATE DRESS CARRIERS, INC.,

Defendants-Appellees.

Before:

MANSFIELD and TIMBERS, *Circuit Judges,* and WERKER, *District Judge.**

HENRY F. WERKER, *District Judge*:

John S. Irving, General Counsel of the National Labor Relations Board, appeals from two orders of the United

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* Honorable Henry F. Werker, District Judge of the Southern District of New York, sitting by designation.

States District Court for the Eastern District of New York (Bramwell, J.), entered on January 12, 1979, adjudicating Irving to be in contempt of court. The first order imposes a $10,000 fine. The second fines Irving an additional $1,000 per day until he complies with the court's order. A stay pending appeal was granted.

The events leading up to these orders of contempt are as follows. On April 5, 1978, Local 20408, United Warehouse, Industrial and Affiliate Trades Employees Union, filed a representation petition with the Newark Regional Office of the NLRB (the "Board") seeking recognition as collective bargaining agent for certain employees of G.S. Supply Associates, Inc. and G.S. Temporary Service, Inc. employed at a terminal of Interstate Dress Carriers, Inc. ("IDC") in Jersey City, New Jersey. This petition was later amended to include additional IDC employees at terminals in Jersey City and New York.

On September 6, 1978, a criminal indictment was returned in the Eastern District of New York charging nine defendants, including IDC and Local 102, International Ladies Garment Workers Union, with conspiracy and obstruction of an administrative proceeding in violation of 18 U.S.C. §§ 2, 371 and 1505. Included in the charges were alleged efforts to bribe and induce Matthew Eason, president of Local 20408, into withdrawing his petition, threats of physical harm and economic injury against Eason, and threats of loss of employment against the employees of IDC, G.S. Supply and G.S. Temporary Service. After a series of efforts by Local 102 and IDC to obtain production of certain "authorization cards" (*i.e.*, membership applications executed by employees as a showing of interest in having Local 20408 represent them), IDC, on December 29, 1978, served two subpoenas on Board personnel directing them to produce at the criminal trial on January 3, 1979 all "authorization cards or applications for membership in Local 20408" and "other writings" concerning a "showing of interest" by employees in Local 20408. On January 3, the Board and the prosecution moved to quash on the ground that the cards were privileged.

The district court, on January 8, 1979, denied the motion to quash and ordered the Board to turn the cards over to the defendants. The Board appealed to this court, which, on January 9, 1979, entered an order dismissing the appeal and denying the Board's application for mandamus. *United States v. DiLapi*, No. 79-1003 (Jan. 9, 1979). John Irving, General Counsel of the Board and custodian of the cards, nonetheless refused to disclose, and IDC moved for dismissal of the indictment. This motion remains pending in the district court. Irving was held in contempt by Judge Bramwell on January 12, 1979 by two orders, one imposing a flat fine of $10,000, and the second imposing fines of $1,000 per day until he complies. Both orders are now stayed pending the Board's instant appeal from the orders of contempt. Both Local 102 and the United States Attorney for the Eastern District of New York have filed amicus briefs. The record indicates that if the contempt orders are upheld here, the Board will relinquish the cards.

1. *Appellate Jurisdiction*

We are met at the threshold with IDC's argument that neither of the two contempt orders issued below are "final" orders within the meaning of 28 U.S.C. § 1291, and therefore neither are within this court's appellate jurisdiction. Invoking the well-established rule that orders of civil contempt against parties to pending proceedings are not appealable, *see Fox v. Capital Co.*, 299 U.S. 105, 107 (1936);

International Business Machines Corp. v. United States, 493 F.2d 112, 117-19 (2d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974); 15 C. Wright & A. Miller, *Federal Practice & Procedure* § 3917 (1976), IDC argues first that both the orders below were orders of civil contempt, and second that the General Counsel to the Board, as part of the government, is "party" to the criminal proceedings below.[1]

With respect to the first order of contempt, imposing a flat fine of $10,000, we conclude that it is an order of criminal contempt and therefore immediately appealable as a final order. *See Union Tool Co. v. Wilson*, 259 U.S. 107, 111 (1922); *International Business Machines Corp. v. United States*, 493 F.2d at 114. The chief characteristic of civil contempt is that its purpose is to compel obedience to an order of the court to enforce the rights of the other party to the action. *Nye v. United States*, 313 U.S. 33, 42 (1941); *McCrone v. United States*, 307 U.S. 61, 64 (1939); *International Business Machines Corp. v. United States*, 493 F.2d at 115. Consistent with this remedial purpose, the sanction imposed is generally made contingent on compliance. *Shillitani v. United States*, 384 U.S. 364, 370 (1966); *Penfield Co. v. SEC*, 330 U.S. 585, 590 (1947); *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 442 (1911). This is often accomplished by a purgation provision, whereby a civil contemnor may purge himself of contempt at any time by compliance. *See generally* C. Wright & A. Miller, *supra*, § 2960. The purpose of an order of criminal contempt, on the other hand, is punitive. It is imposed to vindicate the court's authority. *Nye v. United States*, 313 U.S. at 43; *see generally* Dobbs, *Contempt of Court: A Survey*, 56 Cornell L. Rev. 183, 235-39 (1971). Accordingly, compliance with the court's command will not lift the sanction. In responding to a single contemptuous act, a court may well impose both criminal and civil sanctions—wishing to vindicate its authority and to compel compliance. *Id.* at 236-37.

[1] IDC also argues that, even assuming one of the contempt orders is criminal, neither is final because its motion to dismiss the indictment is still pending before the district court, which therefore has not yet finished imposing "sanctions" for the government's refusal to produce the cards. While it is true that a contempt order is not final until sanctions have been imposed, *see* C. Wright & A. Miller, *supra*, § 3817 at 617, it seems to us that the pendency of a motion to dismiss a criminal indictment based on the prosecution's failure to disclose is unrelated to the contempt sanctions here, which are clearly limited to the fines set forth in the orders below. Should dismissal ultimately become proper, it would not be a sanction stemming from contempt, but rather the vindication of a criminal defendant's right to discovery of evidence material to his defense. *See United States v. Andolschek*, 142 F.2d 503 (2d Cir. 1944). Even assuming dismissal were deemed a "sanction" of sorts, it would be a sanction running against the prosecution rather than the General Counsel, who is, of course, the contemnor here.

This is what the district court intended here. In his first order, imposing on Irving a flat fine of $10,000 for "wilful" contempt, Judge Bramwell captioned his order in a criminal contempt format, followed the language of Fed. R. Crim. P. 42(a), and made no provision for purgation. The fine was punitive, levied regardless of subsequent compliance. We find that this order held Irving in criminal contempt and is therefore immediately appealable.

We also find that the second order, which imposes a continuing fine of $1,000 per day and contains a provision for purgation, has coercion as its primary purpose and constitutes an order in civil contempt. Therefore, to determine whether this order is immediately appealable, it is necessary to consider whether Irving, as General Counsel to the Board, is a "party" to the criminal proceeding below.

IDC, viewing the "government" as a monolith, argues in effect that the government (*i.e.*, the Justice Department) is prosecuting the criminal action below, and therefore, the government (*i.e.*, the General Counsel to the Board) is "party" to the action. Refining this argument somewhat, IDC cites authority indicating that the duty of disclosure in criminal cases affects not only the prosecutor but the government as a whole. *See United States v. Caldwell*, 543 F.2d 1333, 1352 n.91 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 1087 (1976); *United States v. Bryant*, 439 F.2d 642, 650 (D.C. Cir. 1971); *United States v. Grayson*, 166 F.2d 863, 870 (2d Cir. 1948). *See also Harvey Aluminum (Inc.) v. NLRB*, 335 F.2d 749, 754 (9th Cir. 1964). Assuming this to be so, however, it has only marginal bearing on the question of whether the General Counsel of the Board is a "party" to a criminal proceeding for the purposes of determining whether an immediate appeal can be taken from an order of civil contempt. The Supreme Court, in *Cobbledick v. United States*, 309 U.S. 323 (1940), while holding that a non-party witness could not appeal a denial of a motion to quash a grand jury subpoena, noted in dictum that appeal would become available if the non-party were to be held in contempt for noncompliance. The Court stated as the rationale for this rule the following:

> At that point the witness' situation becomes so severed from the main proceeding as to permit an appeal. To be sure, this too may involve an interruption of the trial or of the investigation. But not to allow this interruption would forever preclude review of the witness' claim, for his alternatives are to abandon the claim or languish in jail.

309 U.S. at 328. *See also Alexander v. United States*, 201 U.S. 117, 121-22 (1905) (dictum); *Fenton v. Walling*, 139 F.2d 608, 610 (9th Cir. 1943), *cert. denied*, 321 U.S. 798 (1944) (since non-parties have no appeal from a final judgment, they have no right of review unless they can appeal independently); *accord, David v. Hooker, Ltd.*, 560 F.2d 412, 417 (9th Cir. 1977). *See generally* 9 J. Moore, *Federal Practice* ¶ 110.13[4], at 167 (2d ed. 1975). Therefore, it is significant, as the Board argues, that the General Counsel has no control over a criminal prosecution brought by the Justice Department nor any right of appeal from a final decision.[2] Furthermore, the Board is not subject to direct control by the Executive Branch, but rather is an independent regulatory agency created by statute, *see* 29 U.S.C. § 153(a), and the General Counsel has certain authority independent of the Board. 29 U.S.C. § 153(d). We conclude that the General Counsel is not a "party" to the criminal proceeding here and, therefore, can bring the instant appeal from the civil contempt order below.[3]

2. *Effect of this Court's January 9, 1979 Decision*

Yet another preliminary issue stands between us and the merits of this case. As noted above, the Board, on January 9, 1979, appealed the district court's denial of its motion to quash and also petitioned for mandamus.

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[2] This case is therefore quite different from our recent decision in *In re Attorney General of the United States*, No. 78-6114 (2d Cir. March 19, 1979), where we held that the Attorney General, who was named in his official capacity as a party defendant, was a "party" to the action and therefore barred from appeal. Slip op. at 1797.

[3] Moreover, since both orders arise from the same conduct and raise the same issues, general policies favoring judicial economy and the avoidance of inconsistent results dictate that the civil order be reviewed at the same time. *See United States v. Martin Linen Supply Co.*, 485 F.2d 1143, 1148-49 (5th Cir. 1973), *cert. denied*, 415 U.S. 915 (1974).

Appendix A

This court, *United States v. DiLapi*, No. 79-1003 (Jan. 9, 1979), held that denial of a motion to quash is not appealable under 28 U.S.C. § 1291 and that the district court did not clearly exceed its powers so as to warrant mandamus. The court also noted that "Judge Bramwell did not abuse his discretion in finding that the material sought here may be important to preparation of the defense." IDC now urges that this determination is dispositive here.

We believe that this court's January 9 findings, made in connection with its refusal to grant a government petition for mandamus to block issuance of a subpoena by a district court during a pending criminal proceeding, do not necessarily imply that contempt sanctions subsequently imposed by the district court for noncompliance were proper. Standards for the issuance of mandamus are strict, *see In re Attorney General of the United States*, No. 78-6114, slip op. at 1799-8000 (2d Cir. March 19, 1979); *National Super Spuds, Inc. v. New York Mercantile Exchange*, No. 78-3041, slip op. at 1025-27 (2d Cir. Jan. 17, 1979); *American Express Warehousing, Ltd. v. Transamerica Insurance Co.*, 380 F.2d 277, 283 (2d Cir. 1967), and this is particularly so in connection with efforts by the government to obtain interlocutory review of orders in criminal cases. Traditionally, the writ has been used only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so," *Roche v. Evaporated Milk Association*, 319 U.S. 21, 26 (1943), and to avoid a judicial "usurpation of power." *De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945). The party seeking mandamus has "the burden of showing that its right to issuance of the writ is 'clear and indisputable.'" *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 662 (1978) (plurality opinion); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953). Although these traditionally narrow limits on issuance of the writ have been recently somewhat expanded in certain cases, *see, e.g., La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) (authorizing "supervisory" mandamus); *Schlagenhauf v. Holder*, 379 U.S. 104 (1964) (mandamus to settle "novel and important" questions); *see generally* Note, *Supervisory and Advisory Mandamus under the All Writs Act*, 86 Harv. L. Rev. 595 (1973), special considerations which arise when the underlying proceeding is a criminal prosecution make careful limitations on mandamus particularly appropriate. *See Will v. United States*, 389 U.S. 90, 96-98 (1967); *United States v. Weinstein*, 511 F.2d 622, 626 (2d Cir.), *cert. denied*, 422 U.S. 1042 (1975); *Stans v. Gagliardi*, 485 F.2d 1290, 1292 (2d Cir. 1973); *United States v. DiStefano*, 464 F.2d 845, 850 (2d Cir. 1972).

Appendix A

In *Will v. United States*, 389 U.S. 90 (1967), a district judge, confronted with a refusal by the prosecution in a criminal case to furnish certain information sought by defendants in a bill of particulars and ordered by the court to be produced, indicated his intention to dismiss the indictment. The court of appeals issued a writ of mandamus directing the district judge to vacate his production order. The Supreme Court reversed. After noting that the judicial caution traditionally associated with mandamus must be heightened in criminal cases due to concerns regarding double jeopardy, speedy trial, and narrow statutory limitations on prosecutorial appeal, *Will v. United States*, 389 U.S. at 96-98, the Court found that since the district court had neither exceeded its power nor engaged in any calculated and repeated disregard of

the rules governing federal criminal trials,[4] *id.* at 100, the court of appeals had erred in issuing mandamus. The Court made amply clear that the mere fact that a district judge's order may be erroneous does not make issuance of mandamus appropriate. A lower court has "power" to make mistakes.

> Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as "abuse of discretion" and "want of power" into interlocutory review of nonappealable orders on the mere ground that they may be erroneous. "Certainly Congress knew that some interlocutory orders might be erroneous when it chose to make them nonreviewable."

Id. at 98 n.6 (citations omitted). *See also United States v. DiStefano,* 464 F.2d at 850; *Stans v. Gagliardi,* 485 F.2d at 1292 (both per Friendly, J.).

We conclude that once this court found in its January 9 ruling that the district court had not exceeded its power, there was, absent some showing of "a calculated and repeated disregard of governing rules," *see United States v. DiStefano,* 464 F.2d at 850, nothing left to decide. Since the record here is devoid of such a showing, we find that the language regarding "abuse of discretion," in the context of a decision on a mandamus petition, while entitled to some consideration, was dictum. Accordingly, the question of whether Judge Bramwell properly exercised his discretion in issuing the contempt orders disputed here remains to be decided.

[4] This latter finding was accompanied by the observation, 389 U.S. at 100 n.10, that those cases involving the use of mandamus to "police procedural rules" (*i.e.*, those cases expanding the availability of mandamus for "supervisory" purposes) were civil cases and indicated that the rule might not apply in criminal cases. Since the record in *Will* supported no systematic or deliberate noncompliance with procedural rules, the Court left the question open. *See* Note, *supra,* 86 Harv. L. Rev. at 622-28.

3. *The Motion to Quash*

Rule 17(c) of the Federal Rules of Criminal Procedure provides that a subpoena duces tecum may be quashed or modified if production of the documentary evidence sought would be "unreasonable or oppressive." The party seeking production has the burden of showing that production would not be "unreasonable or oppressive" by establishing:

> (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."

United States v. Nixon, 418 U.S. 683, 699-700 (1974) (footnote omitted), *citing United States v. Iozia,* 13 F.R.D. 335, 338 (S.D.N.Y. 1952) (Weinfeld, J.). Because this four-tiered test is composed of factual issues that must be resolved by the trial court, the decision to quash or modify a subpoena duces tecum must be left to the trial judge's sound discretion. *United States v. Nixon,* 418 U.S. at 702; *United States v. Berrios,* 501 F.2d 1207, 1212 (2d Cir. 1974). Accordingly, the trial court's decision is not to be disturbed on appeal unless it can be shown that it acted arbitrarily and abused its discretion or that its finding was without support in the record. *United States v. Nixon,*

418 U.S. at 702; *United States v. Berrios*, 501 F.2d at 1212.

On the record before us, it cannot be said that the district court abused its discretion or acted without support in ordering production of the authorization cards. If the cards are in fact forged or otherwise fraudulent, they may provide the defendants with a basis for asserting an entrapment defense. Additionally, the defendants could certainly utilize the cards in attempting to impeach Eason's credibility. Thus, the district court did not abuse its discretion in finding "that the documents subpoenaed bear on the transaction underlying the instant indictment and are material to adequate preparation of IDC's defense . . . ." We conclude that the requirements of Rule 17(c) were satisfied.

The United States and the Board, however, assert a claim of privilege and contend that the district court did not properly take into account the privileged nature of the authorization cards. The United States and the Board are correct to the extent that authorization cards are indeed privileged material exempt from discovery during Board proceedings [5] and from disclosure under the Free-

[5] The National Labor Relations Act provides that employees have the right to form labor organizations and to bargain collectively through representatives of their own choosing free from interference and coercion from either employers or unions. 29 U.S.C. §§ 157, 158(a), (b). Consequently, the Act requires representation elections to be held by secret ballot. 29 U.S.C. § 159(e)(1). To ensure that secrecy is maintained, the Board has traditionally restricted discovery in labor relations proceedings. *See generally Lyman Printing & Finishing Co.*, 183 NLRB 1084, App. A at 1055-56 (1970), and cases therein cited. This policy has generally been upheld by the courts. *E.g., Title Guar. Co. v. NLRB*, 534 F.2d 484, 487 (2d Cir.), *cert. denied*, 429 U.S. 834 (1976); *NLRB v. Interboro Contractors, Inc.*, 432 F.2d 854, 858 (2d Cir. 1970), *cert. denied*, 402 U.S. 915 (1971); *Electromec Design & Dev. Co. v. NLRB*, 409 F.2d 631, 635 (9th Cir.

(footnote continued on following page)

dom of Information Act ("FOIA"), 5 U.S.C. § 552.[6] The Board's long-standing policy of maintaining the confidentiality of authorization cards and the courts' exempting of the cards from FOIA disclosure are based on the fear of reprisals and the "chilling effect" which would result from disclosure to employers or rival unions.[7]

(footnote continued from preceding page)

1969); *NLRB v. Vapor Blast Mfg. Co.*, 287 F.2d 402, 407 (7th Cir.), *cert. denied*, 368 U.S. 823 (1961).

It should also be noted that the rules and regulations of the Board prohibit Board employees from producing "any files, documents, reports, memoranda, or records of the Board or of the general counsel, whether in response to a subpoena duces tecum or otherwise, without the written consent of the Board or the chairman of the Board if the document is in Washington, D.C., and in control of the Board; or of the general counsel if the document is in a regional office of the agency or is in Washington, D.C., and in control of the general counsel. . . ." 29 C.F.R. § 102.118(a)(1).

[6] *Pacific Molasses Co. v. NLRB*, 577 F.2d 1172 (5th Cir. 1978) (FOIA does not compel disclosure of union authorization cards); *Committee on Masonic Homes v. NLRB*, 556 F.2d 214 (3d Cir. 1977) (union authorization cards are exempt from FOIA disclosure). This circuit recently held that even the number of authorization cards submitted during an organizational campaign is exempt from disclosure under the FOIA. *American Airlines, Inc. v. National Mediation Bd.*, 588 F.2d 863 (2d Cir. 1978). *See also NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978) (prehearing witness statements are exempt from FOIA disclosure at least until completion of Board unfair labor practice proceeding); *Title Guar. Co. v. NLRB*, 534 F.2d 484 (2d Cir.), *cert. denied*, 429 U.S. 834 (1976) (prehearing statements of employees and union representatives are exempt from FOIA disclosure to extent such disclosure would interfere with Board enforcement proceedings).

[7] In *Pacific Molasses Co. v. NLRB*, the Fifth Circuit recognized the dangers threatened by the disclosure of authorization cards:

> [I]t is impossible to minimize the seriousness of the threatened invasion. We would be naive to disregard the abuse which could potentially occur if employers and other employees were armed with this information. The inevitable result of the

(footnote continued on following page)

In this case, the important public interest in maintaining the confidentiality of the cards clashes head on with the defendants' fundamental right to due process of law, for it has been found that the cards are material to the defendants' defense of the criminal charges asserted against them. In similar situations, the Supreme Court has engaged in a balancing process, weighing the conflicting interests involved. *See, e.g., United States v. Nixon,* 418 U.S. at 707-13 (executive privilege); *Roviaro v. United States,* 353 U.S. 53, 61-62 (1957) (informer privilege).[8] The district court below utilized a balancing analysis and struck a balance in favor of disclosure. We do not believe it erred.

In *United States v. Nixon,* the Supreme Court considered the interests underlying a presidential claim of executive privilege against the interest underlying a prosecutorial

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(footnote continued from preceding page)

> availability of this information would be to chill the right of employees to express their favorable union sentiments. Such a chilling effect would undermine the rights guaranteed by the N.L.R.A., and, for all intents and purposes, would make meaningless those provisions of the N.L.R.A. which guarantee secrecy in union elections.

577 F.2d at 1182. *Accord, Committee on Masonic Homes v. NLRB,* 556 F.2d at 220-21. *See NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. at 239-40; *Title Guar. Co. v. NLRB,* 534 F.2d at 491.

The threat of violence in the instant case has been substantiated by the affidavit of James D. Harmon, dated January 5, 1979. This sealed affidavit, which was submitted by the United States, was not considered by the district court.

[8] In *Roviaro v. United States,* the Supreme Court held that the scope of the informer privilege was to be limited by its underlying purpose. 353 U.S. at 60. In the instant case, the scope of the privilege of the authorization cards must be similarly limited to ensuring that employees who sign authorization cards are free from reprisal and coercion. Hence, as long as the rights and safety of such employees can be adequately protected, the strict confidentiality of the cards must give way to a sufficient showing of need for disclosure.

attempt to gather evidence in an ongoing criminal prosecution. Although the Court recognized that "great deference" is to be accorded the constitutionally based, fundamental privilege of presidential communications, it nevertheless concluded that the executive privilege may be outweighed by the "legitimate needs of the judicial process." 418 U.S. at 706-07. Where the privilege was asserted solely on the basis of a "generalized interest in confidentiality," the Court held that it could not prevail over a "demonstrated, specific need for evidence in a pending criminal trial." *Id.* at 713.

The factors in favor of disclosure in the instant case are at least as strong as those in *United States v. Nixon.* The Supreme Court's observations in that case apply with equal force here:

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

418 U.S. at 709. Indeed, the considerations supporting disclosure in the case at bar are even stronger than those in *Nixon* in that the rights of defendants are at stake

rather than the interests of the prosecution. *See generally Will v. United States*, 389 U.S. at 96-98.

We thus conclude that the authorization cards cannot be kept completely confidential. However, in view of the important and valid public interest in maintaining the confidentiality of authorization cards, and under the specific circumstances of this case, we feel that a more limited order of disclosure than that issued by the district court is warranted. Accordingly, the district court's disclosure order is modified[9] as follows: The subpoenaed authorization cards and membership applications are to be disclosed to the attorneys for the defendants, but they are not to be disclosed to the defendants themselves. The records are to be produced in bulk rather than individually to ensure that knowledge of the identities of the employees who signed the cards can be confined to counsel. This compromise will enable the defendants' attorneys to determine whether any of the cards were forged or are relevant to the defense. At the same time, the confidentiality of the employees will be adequately protected. Should specific forgeries be found or should an explicit showing of need be made, then the district court in its discretion may order full disclosure of the specific cards in question. If after examining the cards counsel for defendants wish to interview particular employees, they may do so outside the presence of the defendants and in the presence of the court or a magistrate so that any interviewed employee

[9] We acknowledge that great deference is to be accorded the district court's decision as to the scope of a subpoena or disclosure order. *United States v. Nixon*, 418 U.S. at 702. However, since we are of the opinion that the district court did not give due recognition to the importance of maintaining the confidentiality of the authorization cards, we are modifying the district court's order to provide for limited disclosure. *Cf. In re Attorney General of the United States*, slip op. at 1807-08.

will be protected from intimidating or coercive questioning. *See generally* Note, *NLRB Discovery After Robbins: More Peril for Private Litigants*, 47 Fordham L. Rev. 393, 413-14 (1978).

4. *The Contempt Orders*

With respect to the civil contempt order, we find that the district court did not abuse its discretion. As we have already noted, a civil contempt order is remedial and coercive in nature, and is intended to secure compliance with lawful judicial decrees. It is essential that the courts have the power to compel the appearance of witnesses and the production of evidence. *Shillitani v. United States*, 384 U.S. at 368-70. In order for a civil contempt order to issue, there must be clear and convincing proof of a violation of a court decree. *Hart Schaffner & Marx v. Alexander's Department Stores, Inc.*, 341 F.2d 101, 102 (2d Cir. 1965) (per curiam); *Stringfellow v. Haines*, 309 F.2d 910, 912 (2d Cir. 1962). Our review of the record leads us to conclude that the evidence clearly and convincingly established grounds for a finding of civil contempt.

With respect to the criminal contempt order, different considerations come into play. The purposes of a criminal contempt order are to punish wilful disregard of the authority of the courts and to deter the occurrence of similar derelictions. *United States* v. *United Mine Workers*, 330 U.S. 258, 302-03 (1947). As the Supreme Court has noted, "[c]riminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong . . . ." *Bloom v. Illinois*, 391 U.S. 194, 201 (1968). A conviction for criminal contempt frequently results in serious penalties and carries the same stigmas as does an ordinary criminal conviction. *Id.* at 201-02, 207-08. *See In re Attorney General of the United States*, slip op. at 1803; *United*

States v. Wendy, 575 F.2d 1025, 1030 (2d Cir. 1978). A judge should resort to criminal contempt only after he determines that holding the contemnor in civil contempt would be inappropriate or fruitless. *Shillitani v. United States*, 384 U.S. at 371 & n.9. Thus, in our opinion, the criminal contempt power is best exercised with restraint.

To warrant being held in criminal contempt,

> the contemnor's conduct must constitute misbehavior which rises to the level of an obstruction of and an imminent threat to the administration of justice, and it must be accompanied by the *intention* on the part of the contemnor *to obstruct, disrupt or interfere with the administration of justice.*

In re Williams, 509 F.2d 949, 960 (2d Cir. 1975) (emphasis added), *citing inter alia Eaton v. City of Tulsa*, 415 U.S. 697 (1974) (per curiam), and *In re Little*, 404 U.S. 553 (1972) (per curiam). In the *Williams* case, we reversed the district court's judgment holding the contemnor in criminal contempt on the grounds the evidence failed to establish beyond a reasonable doubt that the requisite intent was present.

In view of the fact that we have modified Judge Bramwell's disclosure order, the criminal contempt order is vacated and the matter is remanded to the district court for reconsideration in light of this opinion.[10] The civil contempt order is affirmed insofar as it relates to the district court's disclosure order as modified herein.

[10] We note that the Board might well not have defied the district court's order had it been modified in the first instance. Moreover, the Board had no feasible alternative to test the propriety of the discovery order but to disobey it and be held in contempt. Finally, Irving's refusal to produce the authorization cards was based on Board instructions and a well-founded, judicially recognized Board policy of confidentiality. The Board did not delay in filing this appeal and all necessary steps were taken to ensure that this matter would proceed expeditiously.

MANSFIELD, *Circuit Judge* (Concurring and Dissenting):

I concur in Judge Werker's carefully considered opinion except for its provision that upon remand any interview of employees by attorneys for the defendants must be conducted "in the presence of the court or a magistrate so that any interviewed employee will be protected from intimidation or coercive questioning" (p. 2179, *supra*). In my view this requirement may have just the opposite effect from that intended. In addition, since many employees are involved, it could result in unnecessary waste of judicial resources and inconvenience to employees.

To require employees who may possibly become witnesses to leave work and proceed to court for interrogation by defense counsel in a strange and formal atmosphere before a judicial official unfamiliar to them may well serve to increase, rather than ease, the apprehension of the employees, as well as to heighten the chance that their identities will become known to the defendants themselves. Since the defendants are already faced with criminal charges in the district court as well as with unfair labor practice charges before the National Labor Relations Board, the chance that their counsel would attempt to intimidate a witness in a private interview strikes me as minimal, particularly since evidence of intimidation might be admissible against the defendants at trial. See *United States v. Lord*, 565 F.2d 831, 835 n.2 (2d Cir. 1977); *United States v. Cirillo*, 468 F.2d 1233, 1240 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973); 2 Wigmore, Evidence § 278 (3d ed. 1940).

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We are not here dealing with the possibility of one or two interviews but with the prospect of interviews of some 150 or more employees.[1] The employees, moreover, may prove to be important to the defense not only to determine whether their signatures were forged (which would require very little questioning) but also to find out whether they were coerced into signing the cards by either Matthew Eason, a convicted felon, or by his alleged henchman Fred Lawson, who, according to the appellees, has been convicted of a long series of felonies, including assault, rape, forgery, and possession of a deadly weapon and of narcotics.

The only practical method for determining whether the employees were subjected to coercion or duress would be to permit defense counsel to interview each employee who signed an authorization card (or at least those who are in the bargaining unit and whose cards were not clearly forged). Each of these interviews would take more time than a mere interrogation to determine the authenticity of the signature. Since defense counsel would not know which employees might have been the subject of coercion or duress, they would, under the majority's decision, be forced to subpoena a large number of employees to appear in court for questioning, which would lead to a substantial waste of judicial resources and a greater risk of identification by the defendants.

If approached informally at home or at work the average employee would in my view be much more likely to cooperate in answering questions, particularly if he realized

[1] The exact number of authorization cards submitted by Local 20408 is unknown, but the NLRB requires signatures of at least 30% of the employees to accompany any representation petition, and IDC has some 500 employees. See Brief for U.S. Attorney at 4; Appendix at 85-86.

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that failure to do so would require him to appear pursuant to subpoena before a magistrate, than if he were forced in the first place to come to court and spend a good deal of time waiting around to be questioned. In short, there would be less risk of intimidation, less waste, and less danger of identification or retaliation by the defendants if the witnesses were interviewed privately by defense counsel and brought before the judge or magistrate only if they proved to be recalcitrant.

I further believe that it should be made clear to the district court that in vacating the criminal contempt order and remanding the matter to it for reconsideration we are not holding that it would be an abuse of discretion for the district court, after full consideration of the record in the light of our modification of its order, to exercise its power to hold parties in criminal contempt. Since we have substantially modified the district court's order so as to preclude access to the authorization cards by the defendants personally and the NLRB had no feasible alternative for testing the original discovery order, we must give the district court the opportunity to reconsider its holding and penalty in the light of our modification and appellant's decision to comply or not to comply with the order as modified. See *Nilva v. United States*, 352 U.S. 385, 396 (1957); *Yates v. United States*, 356 U.S. 363, 366 (1958); *Donovan v. City of Dallas*, 377 U.S. 408, 414 (1964); and *Southern Railway Co. v. Lanham*, 403 F.2d 119, 135 (5th Cir. 1968).

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

—against—

ANTHONY DI LAPI, *et al.*,

Defendants.

[UNEDITED TRANSCRIPT OF JANUARY 8, 1979]

HENRY BRAMWELL, *District Judge*:

My decision today concerns the Government's and the NLRB's motion to quash two IDC subpoenas served on the NLRB Regional Director, Mr. Eisenberg, and on an NLRB hearing officer, Ms. Anderson who is investigating the representative petition filed by Local 20408. This representation petition forms the underlying basis for the instant indictment. These subpoenas seek the authorization cards or applications for membership in Local 20408 which were signed by employees of IDC, GS Supply and GS Temporary and all other documents concerning employee showing of interest.

Initially, IDC has urged that the instant motion to quash is patently frivolous, further evidence of unscrupulous conduct on the part of the Government and disrespect for this Court. IDC urges that such conduct mandates dismissal of the indictment. As the following will show, my examination of the case law reveals that the Government's position has considerable merit and brought to the Court's attention a

significant and important issue. No evidence of bad faith or disrespect for the Court is even suggested by the Government's action and a dismissal of the indictment is clearly not warranted.

Turning to the motion to quash, the Government and the NLRB position, vigorously contested by IDC, so that the documents subpoenaed are privileged material and that disclosure would have a serious and disruptive influence the Local 20408 organizational effort and any secret election that is ordered by the Board. It is contended that disclosure of these documents, which are submitted on a confidential basis, would expose employees to undue pressure from their employers and would invade the privacy rights of the employers which is needed for the full and uninhibited exercise of organizational rights. In short the NLRB argues that disclosure would invade the organizational process and disrupt the delicate area of labor relations.

The NLRB's position finds considerable support in the case caw. Of note is the recent Second Circuit decision in *American Airlines* v. *National Mediation Board.* There, in a suit brought under the Freedom of Information Act, the Court held that the number of authorization cards submitted to the National Mediation Board, the functional equivalent of the NLRB, was exempt from disclosure under the FOIA. While the factual setting of the *American Airlines* case is distinguishable, the following statement of the Court has bearing on the instant motion and I quote.

> "Here the information sought directly affects the status of the union's efforts to obtain majority support and ultimate certification. The Board has traditionally treated this information as confidential, and the union provides it under the express promise of confidentiality in the regulations . . .

> "It seems apparent that the disclosure of this information would adversely affect the union's competitive position vis-a-vis both other unions and the employer itself. Not only does the union supply this information in reliance upon the promise in the regulations that the Board will keep the information confidential, . . . but the information relates to the very delicate area of labor relations with which . . . the courts should be very hesitant to interfere."

Thus, the NLRB argues if disclosure of only the number of cards would have this disruptive effect, the more extensive material subpoenaed by IDC certainly would and must not be disclosed.

While the case law clearly reveals that the documents subpoenaed by IDC have an aura of privilege surrounding them, IDC urges that disclosure is mandated in view of its Sixth Amendment rights to a fair trial, confrontation and compulsory process. Recognizing these rights, the Government and the NLRB urge non-disclosure, nonetheless on the ground that these documents are irrelevant to the issues to be tried in the instant indictment. Moreover, they have added a constitutional dimension to their argument by noting that employee organizational activity is a fundamental right under the Supreme Court's decision in *NLRB* v. *Jones & Laughlin Steel Corp.*, and is included within the First Amendment rights of assembly and association. Disclosure of these privileged, confidential and irrelevant documents, therefore, would infringe unnecessarily on these constitutional rights.

This position that the subpoenaed documents are irrelevant centers on the Government contention that the mere filing of the representation petition by Local 20408 and Mr. Eason commenced the NLRB proceeding and that any acts

which endeavor to influence, intimidate or impede any witness in the proceeding before the NLRB brings 18 U.S.C. Section 1505 into play. Since the filing of the petition initiates the proceeding for purposes of Section 1505, the evidence of employee support for Local 20408 is urged as irrelevant to this criminal indictment.

That Section 1505 is brought into play by the mere filing of a representation petition which initiates the NLRB investigation is amply supported by the case law. For this conclusion, I direct the parties' attention to the Second Circuit decision in *U.S.* v. *Abrams*, the Sixth Circuit decision in *U.S.* v. *Frichtman*, the Eight Circuit decision, in *Rice* v. *U.S.*, the Ninth Circuit decision, in *U.S.* v. *Vixie* and the Tenth Circuit decision in *U.S.* v. *Browning, Inc.* In *Rice*, a case also involving interference with the NLRB, the Court stated and I quote.

> "'Proceeding' is a comprehensive term meaning the action of proceeding, a particular step or series of steps, adopted for accomplishing something. This is the dictionary definition as well as the meaning of the term in common parlance. Proceedings before a governmental department or agency simply m-an proceeding in the manner and form prescribed for conducting business before the department or agency, including all steps and stages in such an action from its inception to its conclusion.
>
> "In our view, it would be absurd to hold that Congress meant to proscribe interference with the administrative process only after a Labor Board proceeding had reached a certain formal stage and let go unpunished individuals who obstruct earlier preliminary proceedings by frightening witnesses into withdrawing charges out of fear for their lives. Con-

> gress clearly intended to punish any obstruction of the administrative process by impeding a witness in any proceeding before a governmental agency, at any state of the proceedings, be it adjudicative or investigative. Congress did not limit the term 'proceeding' as used in Section 1505 to only those acts committed after a formal stage was reached, and we cannot so limit the term."

At a point later the Court continued and I quote.

> "Governmental agency proceedings frequently embrace both investigative and adjudicative proceedings. This is referred to by the Supreme Court in *Hannah* v. *Larche*. The issue here was not present in Hannah, but it is noted that Chief Justice Warren referred to both investigative and adjudicative actions as being 'proceedings.'"

While the Court agrees with this position, I cannot say that under no circumstances is the material subpoenaed irrelevant to the crimes charged in this indictment. As previously noted, the documents subpoenaed reflect employee showing of interest with respect to the Local 20408 representation petition which lies at the heart of the instant indictment. The documents thus relate directly to this criminal proceeding.

The analysis of Judge Learned Hand in the Second Circuit decision of U.S. v. Andolschek is extremely relevant to the instant motion. There, the trial Judge had excluded certain documents based upon an IRS regulation which forbade disclosure. In reversing, the Court stated and I quote, "None of these cases involved the prosecution of a crime consisting of the very matters recorded in the suppressed

document, or of matters nearly enough akin to make relevant the matters recorded. That appears to us to be a critical distinction. While we must accept it as lawful for a department of the Government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be concluded in the open, and will lay bare their subject matter. The Government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully. Nor does it seem to us possible to draw any line between documents whose contents bears directly upon the criminal transactions, and those which may be only indirectly relevant. Not only would such a distinction be extremely difficult to apply in practice, but the same reasons which forbid suppression in one case forbid it in the other, though no, perhaps, quite so imperatively. We hold that the regulation should have been read no to excluse the reports here in question."

Similarly, in U.S. v. Reynolds, the Supreme Court stated and I quote, "The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allot it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."

Finally, in the Second Circuit decision of In re Taylor, the Court, relying on Andolshek and Reynolds, stated and I quite, "In camera examination of evidence by a Court

will no, for example, suffice to sustain a judgment of conviction where the Government, because of a claim of privilege, has failed to disclose to a defendant information which might be relevant to his defense."

That the legitimate need of the defendant herein for the subpoenaed documents can outweigh the Government's and the NLRB's claims of privilege and confidentiality is further supported by the Supreme Court decisions invoking informers and the Supreme Court decisions in Brangburg v. Hayes and U.S. v. Nixon. In the informant situation, the Court in Roviaro v. U.S. stated and I quote, "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders non-disclosure erroneous must depend on the particular circumstnce of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

That the informant's identity is available to a criminal defendant when it is critical to his case is further evidenced by the Supreme Court decisions in MrCray v. Illinois, Smith v. Illinois and Alford v. U.S.

In Branzburg, the Supreme Court rejected the notion that the First Amendment privilege asserted by mewsman was paramount to the general obligation of a citizen to appear before a Grand Jury or at trial and give whatever information he possessed even if such information was confidential in nature.

Moreover, the Court rejected as unavailing the argument that forced disclosure of confidential information would severely restrict the free flow of information and, therefor, severely hamper a reporter's ability to obtain information.

The Court stated and I quote, "On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective Grand Jury proceedings is insufficient to override the consequential, but uncertain, burden on views gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid Grand Jury investigation or criminal trial."

Of further note in this regard are the four in chambers opinions of Mr. Justice White and Mr. Justice Marshall in New York Times Co. v. Joscalevich. No less can be said here. The asserted disruptive and chilling effect on employee organization rights cannot outweigh what the Court believes to be a legitimate need for the documents subpoenaed.

Moreover, should any disruption occur or should any undue pressure be exerted on the employees of IDE, I do not believe that the NLRB would be unable to take corrective action. The case law is replete with examples of the NLRB taking such corrective action.

Finally, in the Nixon case, the Supreme Court permitted disclosure of Presidential papers in the face of a claim of executive privilege which was considered to be of constitutional dimensions. The Court noted that the privilege of withholding relevant evidence is not lightly created or expansively construed since it is in derogation of the search for truth. The Court stated and I quite, "The very integrity of the judicial system and the public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense."

Appendix B

Later in its opinion, the Supreme Court stated and I quote, "The allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for the production of relevant evidence in a criminal proceeding is specific and central to the fair adjustication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending cases."

No less can be said with respect to the documents subpoenaed by IDC.

In light of the above and since I find that the documents subpoenaed bear on the transaction underlying the instant indictment and are material to adequate preparation of IDC's defense, the generalized privilege and interest in confidentiality asserted by the Government and the NLRB must give way. Therefore, the motion to quash is denied and it is ordered that the documents subpoenaed be turned over to IDC.

1) American Airlines v. National Mediation Board, 588 F. 2d 863 (2d Cir. 1978)

2) U.S. v. Abrams, 427 F. 2d 86 (2d Cir. 1970)

3) U.S. v. Fruchtman, 421 F. 2d 1019 (6th Cir. 1970)

4) Rice v. U.S., 356 F. 2d 709 (8th Cir. 1966)

5) U.S. v. Vixie, 532 F. 2d 1277 (9th Cir. 1976)

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6) U.S. v. Browning, Inc., 572 F. 2d 720 (10th Cir. 1978)

7) NLRB v. Jones & Laughlin, 57 S.Ct. 615 (1937)

8) U.S. v. Andolschek, 142 F. 2d 503 (2nd Cir. 1943)

9) U.S. v. Reynolds, 345 U.S. 1 (1953)

10) In re Taylor, 567 F. 2d 1183 (2d Cir. 1977)

11) Branzburg v. Hayes, 92 S. Ct. 2646 (1972)

12) U.S. v. Nixon, 94 S. Ct. 2646 (1972)

13) McCray v. Illinois, 87 S. Ct. 1056, 1062 (1967)

14) Smith v. Illinois, 88 S. Ct. 748, 749 (1968)

15) Alford v. U.S., 51 S. Ct. 218, 220 (1931)

16) Roviaro v. U.S., 77 S. Ct. 623, 627-29 (1957)

17) New York Times Co. v. Jascalevich, 98 S. Ct 3058, 98 S. Ct. 3060, 99 S. Ct. 6, 99 S. Ct. 11 (1978)

APPENDIX C

UNITED STATES CONSTITUTION

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.